86-128

NO. _____

FILED
JUL 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

RONALD L. FLORENCE and MARION FAYZ FLORENCE

PETITIONERS

VS.

COMMISSIONER OF INTERNAL REVENUE

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

By: Petitioners / Pro Se
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6 Copies

QUESTIONS PRESENTED

1. Whether private litigants in federal administrative courts are entitled to know, at the interim level, the premises upon which claims, determinations, conclusions or judgments are based, and have these premises appear on the record, as a matter of record.

2. Whether federal taxation is established by revenue acts of Congress.

3. Whether the legality of the Legislative Court Procedure of the Internal Revenue Code, including Tax Court, is dependent upon "Indebtedness".

4. Whether the Respondent's refusal to address the issues of substance at the administrative level, the Tax Court's refusal to address the issues of substance at the Tax Court level, and the Appeals Court's refusal to address the issues of substance raised by Petitioners is a "Conspiracy of Silence" designed to

prejudice Petitioners case and deny essential justice.

5. Whether the private individual can be lawfully destroyed by the Distress and Distraint "By Any Means" described in Internal Revenue Code Section 6331(b), even though the private litigant is not of the status and does not receive the executed considerations of those described in Internal Revenue Code Section 6331(a).

6. Whether Title 26, United States Code, is evidence of positive statutory law, or resort must be had to original statutes if the two are inconsistent.

7. Whether Petitioners can be penalized for relying on the opinions of the Supreme Court.

8. Whether the Commissioner of Internal Revenue is entitled to judgment in this case when no premises appear on the face of the record.

PETITION FOR CERTIORARI

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RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Ronald L. Florence and Marion Fayz Florence, the Petitioners herein, pray that a Writ of Certiorari issue to review the

judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on January 22, 1986.

OPINIONS BELOW

The memorandum of the United States Court of Appeals for the Ninth Circuit is unreported at 84-7693, and is reprinted in Appendix A hereto, infra, page 1. The order and decision of the Tax Court is reprinted in Appendix A hereto, infra, page 8.

JURISDICTION

The memorandum of the United States Court of Appeals for the Ninth Circuit (Appendix A, infra, page 1) was entered on January 22, 1986. A timely petition for rehearing was denied on April 16, 1986 (Appendix A, infra, page 23). The jurisdiction of the United States Supreme Court is invoked under Title 28, United States Code, § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Article I, Section 8, Clause 1, United States Constitution, providing that:

> "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts, and Excises shall be uniform throughout the United States."

Title I, United States Code, Section 204, the pertinent portion of the text quoted at Appendix B, page 24.

Title 26, United States Code, Section 6331, the pertinent portion of the text quoted at Appendix B, page 26.

STATEMENT OF THE CASE

This is an action by the Commissioner of Internal Revenue, purportedly to recover a "deficiency" for federal taxes from Petitioners for 1977.

With administrative petitions filed under the First Amendment to the United States Constitution, and before issuance of the notice of deficiency, Petitioners had moved for formal administrative hearings so that Respondent could plead his jurisdictional facts and rational basis in law for his claim, and Petitioners could therefore be fully informed of the nature of the claim. Notice was given denying the "taxpayer" status, that the return had been filed in error due to mistake of jurisdictional fact, and notice given that the return was rescinded.

Without hearing or notice of hearing, and without pleading any jurisdictional facts, rational basis in law or factual foundation on the record, the Commissioner issued the complained-of notice of deficiency with notice that remedy could be had in the United States Tax Court.

Petitioners subsequently filed a petition in the Tax Court to vindicate their rights, alleging the lack of hearings, jurisdictional facts on the record, and rational basis in law for their claim. In his answer, Respondent's counsel denied the allegations without stating the reason for denial, as required by Tax Court Rule 36(b).

Respondent's counsel, at pretrial conference, was again given the opportunity to state the premises upon which the claim was made, and counsel again refused to state any jurisdictional facts, rational basis in law, statute, Internal Revenue Code section, allege corporate capacity or government employment, or allege any fact to which any identified law attached a legal consequence.

Petitioners subsequently filed in the Tax Court a Trial Court Memorandum and Tender of Issue, tendering issue on the

ultimate facts of indebtedness and objecting to the Article I / Political Procedure until indebtedness was pleaded and proved as a matter of law.

Without addressing the issues and facts of indebtedness upon which the legality of the extra-judicial procedure reasonably depends, the Tax Court granted summary judgment to Respondent, absurdly enough, stating that there were no facts in dispute. The Tax Court, without citing a Code section or statute imposing the indebtedness, ordered and decided there was a deficiency of $7,302.36, awarded $365.12 under IRC Section 6653(a), and without addressing the issues of substance, awarded $500.00 damages under IRC Section 6673, allegedly for bringing a frivolous and groundless case to the court.

Petitioners appealed to the United States Court of Appeals for the Ninth Circuit under Federal Rules of Appellate

Procedure, Rules 13 and 15, and judicial review of all subsequent administrative actions under 5 U.S.C. § 706, 28 U.S.C. § 2072, and 28 U.S.C. § 2112.

The Appeals Court, like the Tax Court, refused to address the fundamental issues of substance raised by Petitioners, failed to note the lack of a statute imposing any indebtedness on Petitioners, but somehow managed to affirm the findings of the Tax Court and further impose attorney fees and double costs totaling $744.10 to the government under Fed. R. App. P. 38, allegedly for a frivolous appeal.

Brief Argument in Support of Each Question Presented

1. ARE PRIVATE LITIGANTS IN FEDERAL ADMINISTRATIVE COURTS ENTITLED TO KNOW, AT THE INTERIM LEVEL, THE PREMISES UPON WHICH CLAIMS, DETERMINATIONS, CONCLUSIONS OR JUDGMENTS ARE BASED, AND HAVE THESE PREMISES APPEAR ON THE RECORD, AS A MATTER OF RECORD?

Any reasonable person would conclude that a litigant be apprised of the claim

against him and be informed by a formal hearing of a judicial nature exactly what that claim is, pleaded on the record. (See 5 U.S.C. § 554(b)(2) and 5 U.S.C. §554(b)(3).

Any reasonable person would believe that all executive agencies, including the Department of the Treasury and subordinate, the Commissioner of Internal Revenue, are bound by Title 5, United States Code (See 5 U.S.C. § 101) and are bound to promulgate rules to adjudicate issues brought before the agency, and no reasonable person would believe that the Treasury Department or Commissioner is exempted from compliance.

Yet, without hearing, without production of statutory authority for the claim, or even production of an Internal Revenue Code Section restating a Congressional Revenue Act creating the alleged indebtedness, Respondent issued his determination without addressing the

premises and proof of jurisdiction on the record. Respondent's determination is clearly erroneous for failure to state a specific claim and cannot ultimately prevail in this matter.

2. IS FEDERAL TAXATION ESTABLISHED BY REVENUE ACTS OF CONGRESS?

Any reasonable person would believe that Congress has the power to lay and collect taxes pursuant to United States Constitution, Article I, Section 8, Clause 1.

Under the large class of authority represented by Morgan v. C.I.R., 309 U.S. 78, any reasonable person would believe that federal revenue acts designate what legal interests or rights shall be taxed. Yet, Respondent has failed to cite any congressional revenue act for his claim. The first time any statute number appeared anywhere in this case was when Respondent cited 68A Stat. 1, the entire Internal Revenue Code, in his appellate answer

brief. Nowhere has Respondent cited any specific revenue act of Congress which applies to Petitioners. As was recognized in Long v. Rasmussen, 281 F. Supp. 236, and Economy Plumbing and Heating Co., Inc. v. U.S., 470 F.2d 585, the Code relates to taxpayers, not to nontaxpayers. Petitioners concede that had Respondent cited the specific, legitimate, jurisdictional facts he was using as a basis for invoking the legislative court jurisdiction of the Internal Revenue Code, there would be no need for the nearly six years of litigation required for this case.

Respondent's presumption of jurisdiction is clearly erroneous for failure to cite the statute conferring jurisdiction for an Article I / Legislative Court determination and cannot ultimately prevail in this matter.

3. IS THE LEGALITY OF THE LEGISLATIVE COURT PROCEDURE OF THE INTERNAL REVENUE CODE, INCLUDING TAX COURT, DEPENDENT UPON "INDEBTEDNESS"?

This Court's opinion in Murray's Lessee v. The Hoboken Land and Improvement Company, 18 How. 272, 59 U.S. 372 at 377, would lead any reasonable individual to believe that the legality of the extra-judicial procedure is dependent upon indebtedness.

This Court's holding in Milwaukee County v. M.E. White Company, 296 U.S. 268, that:

> "Obligation to pay taxes is not penal, but is a statutory liability, quasi-contractual in nature, enforceable, if there is no exclusive statutory remedy, in civil courts by common law action of debt or indebtedness assumpsit."

leaves no doubt that obligation to pay taxes is a statutory liability and is also a debt issue.

The exceptional circumstance of this case is that Respondent has produced no

statute for his claim on any record, nor alleged any facts of indebtedness on any record. Respondent has erred on the record in the first instance by granting himself judgment of a supposed deficiency without the jurisdictional prerequisite of statutory authority or other facts of indebtedness on the record. The Tax Court upheld the Respondent's findings, notwithstanding Petitioner's extensive pleadings on the indebtedness and jurisdictional issues. The Appeals Court, being fully briefed on the indebtedness and jurisdictional issues raised by Petitioners, refused to comment on the issues and, incredibly, found that the Tax Court had not abused its discretion.

Petitioners contend that without the prerequisite of a proven statutory indebtedness, there can be no Article I discretionary authority by either the Respondent at the administrative level, or

the Tax Court at the Tax Court level and, therefore, no discretion for the Appeals Court to uphold.

The Appeals Court prejudiced Petitioners' case by not commenting on this issue as Petitioners presented it. Respondent and the various tribunals involved fraudulently claimed that Petitioners had frivolously argued that the Tax Court is unconstitutional, which Petitioners did not. Petitioners maintained then and maintain now that Tax Court is constitutional for those who are indebted and, therefore, subject to the Public Rights Doctrine described in Murray's Lessee v. The Hoboken Land and Improvement Company, 18 How. 272, 59 U.S. 372; Crowell v. Benson, 285 U.S. 22; Northern Pipeline Construction Company v. Marathon Pipe Line Company, 458 U.S. 50. What Petitioners argued then and now is that there is no basis for an Article I

determination in Respondent's favor against those who are not indebted and, therefore, not subject to the Public Rights Doctrine.

The Appeals Court, in not addressing this issue as Petitioners had presented it, prejudiced Petitioners case and denied essential justice.

4. IS THE RESPONDENT'S REFUSAL TO ADDRESS THE ISSUES OF SUBSTANCE AT THE ADMINISTRATIVE LEVEL, THE TAX COURT'S REFUSAL TO ADDRESS THE ISSUES OF SUBSTANCE AT THE TAX COURT LEVEL, AND THE APPEALS COURT'S REFUSAL TO ADDRESS THE ISSUES OF SUBSTANCE RAISED BY PETITIONERS A "CONSPIRACY OF SILENCE" DESIGNED TO PREJUDICE PETITIONERS CASE AND DENY ESSENTIAL JUSTICE?

The first and main issue of substance raised by Petitioners in the lower courts was the issue of indebtedness and its relationship to the extra-judicial remedy. Any reasonable person, in reading the High Court's opinion in Murray's Lessee v. The Hoboken Land and Improvement Company, 18 How. 272, 59 U.S. 372, would believe that the legality of the extra-judicial procedure and remedy is dependent

upon indebtedness and the private individual has the right to draw in question the issue of indebtedness (59 U.S. at 377). Uncontested on the record is the fact that the Petitioners raised the jurisdictional and indebtedness matters on the administrative record, the Tax Court record, and the Appeals Court record. The Respondent, the Tax Court and the Appeals Court have prejudiced and denied essential justice to Petitioners' case by studiously avoiding any mention of the indebtedness issue on any briefs or memorandum orders. Instead of addressing the issues of substance raised by Petitioners, both the Tax Court and the Appeals Court erroneously imposed sanctions against Petitioners, allegedly for meritless, groundless, and frivolous arguments, arguments that Petitioners did not make.

Petitioners ask the High Court to correct this defect in the interest of essential justice.

5. CAN THE PRIVATE INDIVIDUAL BE LAWFULLY DESTROYED BY THE DISTRESS AND DISTRAINT "BY ANY MEANS" DESCRIBED IN INTERNAL REVENUE CODE SECTION 6331(b), EVEN THOUGH THE PRIVATE LITIGANT IS NOT OF THE STATUS AND DOES NOT RECEIVE THE EXECUTED CONSIDERATIONS OF THOSE DESCRIBED IN INTERNAL REVENUE CODE SECTION 6331(a)?

The Internal Revenue Code might best be characterized as a law of administrative rules, regulations, sanctions and procedures on those who are indebted to the government (taxpayers). Its application is appropriate to and dependent upon indebtedness, or being a taxpayer. As was recognized in Long v. Rasmussen, 281 F. Supp. 236, and Economy Plumbing and Heating Co., Inc. v. U.S., 470 F.2d 585, the code relates to taxpayers, not to nontaxpayers. Any reasonable person would believe that because there is a specific statute (Public Salary Tax Act of 1939) taxing the wages and salaries of the public officials

described in Internal Revenue Code Section 6331(a) (creating an indebtedness), that this procedure is appropriate for those public officials. This section is entirely consistent with the Public Rights Doctrine described in Northern Pipeline Construction Company v. Marathon Pipe Line Company, 458 U.S. 50 (1982); Crowell v. Benson, 285 U.S. 22 (1932); and Murray's Lessee v. The Hoboken Land and Improvement Company, 18 How. 272, 59 U.S. 372 (1856), and is an appropriate housekeeping rule to be used against those public employees and officials listed. Private persons are not listed and, under the maxim, expressio unius est exclusio alterius, the expression of one thing is the exclusion of another, this code section is again consistent with the Public Rights Doctrine. The Respondent has failed to cite any specific Congressional Revenue Act on any record relating to Petitioners

and therefore has no basis for invoking his legislative court jurisdiction of distress and distraint "by any means".

The facts of this matter is that Respondent has repeatedly and is currently using this legislative court procedure against Petitioners and is reducing them to a state of absolute peonage without the prerequisite of a proven indebtedness on any record. Respondent's action is clearly erroneous and cannot ultimately prevail on this matter.

The Appeals Court, as with numerous other questions, would not even comment on this matter.

6. IS TITLE 26, UNITED STATES CODE, EVIDENCE OF POSITIVE STATUTORY LAW, OR MUST RESORT BE HAD TO ORIGINAL STATUTES IF THE TWO ARE INCONSISTENT?

Any reasonable person would conclude from reading Title 1, Section 204, and this Court's holding in Stephan v. U.S., 319 U.S. 423, and U.S. v. Welden, 377 U.S. 95, as well as American Export

Lines, Inc. v. U.S., 290 F.2d 925 (CC-1961), Murrell v. Western Union Telegraph Company, 160 F.2d 787 (5th-1947), U.S. v. Standard Accident Insurance Company, 280 F.2d 445 (1st-1960), and Abell v. U.S., 518 F.2d 1369 (CC-1975) cert. denied, 429 U.S. 817, that for those titles not enacted into positive law, that if construction of a section of the United States Code which has not been enacted into positive law is necessary, recourse must be had to original statutes themselves, and Code cannot prevail over the Statutes at Large if the two are inconsistent. Yet, in direct conflict with these holdings and without comparing any specific statute that supposedly creates the alleged special tax indebtedness in this case, the Appeals Court declared Title 26, Internal Revenue Code, to be law in this case. The exceptional circumstances of this case is that the Respondent

has not cited any Code Section that he is using for his claim, nor cited any statute or congressional revenue act for his claim on any record.

Petitioners ask the High Court to resolve this conflict in the interest of essential justice.

7. CAN PETITIONERS BE PENALIZED FOR RELYING ON THE OPINIONS OF THE SUPREME COURT?

As this Court held in U.S. v. Mason, 412 U.S. 391:

> "Doctrine of stare decisis requires that people in their everyday affairs be able to rely on United States Supreme Court decisions and not be needlessly penalized for such reliance."

As this Court stated in Lemon v. Kurtzman, 411 U.S. 192 at 199:

> "....statutory or even judgemade rules of law are hard facts on which people must rely in making decisions and in shaping their conduct."

Petitioners believe in all good faith, pursuant to this Court's opinion in

Murray's Lessee v. The Hoboken Land and Improvement Company, 18 How. 272, 59 U.S. 372 at 377, that the legality of the extra-judicial procedure is reasonably dependent upon indebtedness.

Petitioners believe in all good faith, pursuant to this Court's holding in Milwaukee County v. M.E. White Company, 296 U.S. 268, that obligation to pay taxes is not penal, but is a statutory liability, as well as a debt issue.

Instead of addressing these reasonable issues of substance, both the Tax Court and the Appeals Court falsified the record on what Petitioners' substantive arguments are, then imposed sanctions for bringing frivolous actions.

Petitioners ask the High Court to correct this travesty of justice.

8. IS THE COMMISSIONER OF INTERNAL REVENUE ENTITLED TO JUDGMENT IN THIS CASE WHEN NO PREMISES APPEAR ON THE FACE OF THE RECORD?

Any reasonable person, in trying to understand who is entitled to judgment of a court of record, could find no better statement of this problem than that stated by Koffler/Reppy in the Hornbook, Common Law Pleading (West-1969), where at page 29 is cited, Theory of Pleading: A Survey Including the Federal Rules, 47 Mich. L. Rev. 297, 339-340 (1949), in summarizing the common law principles of pleading still in effect, declare first:

> "A Judgment of a Court of Record is a conclusion drawn from premises appearing on the face of the Judgment Record."

Respondent has cited no revenue act of Congress, no facts to which Congress has attached a legal consequence and, therefore, no premises upon which to form a conclusion, determination or judgment that Petitioners are indebted, or have a

deficiency. Petitioners believe that this lack of premises appearing on the judgment record of the Commissioner and the Tax Court is clearly erroneous and the Commissioner cannot ultimately prevail on this matter.

REASONS FOR GRANTING WRIT

I

This petition brings before the Court an important question of the extra-judicial procedure of the Internal Revenue Code which has not been, but should be, settled by this Court.

The Supreme Court should declare, once and for all, whether the vague, indefinite, ambiguous language of the Internal Revenue Code is law that everyone can rely upon in the conduct of everyday affairs, or if "something more" is required to invoke its provisions; that "something more" being jurisdictional facts that would trigger

the extra-judicial rules, regulations, sanctions and procedures. And if "something more" is required, what exactly is that "something". Is it a statutory revenue act of Congress? Respondent has cited no statutory revenue act of Congress on any record for his claim. Is it some basis other than statute? If so, this basis should be pleaded on the record, as a matter of record, so that Petitioners have an opportunity to plead against it or concur and, therefore, end needless litigation.

The only support Respondent has given for his claim is various case law citations. But, as was held in H.R. Laboratories, Inc. v. U.S., 55 F. Supp. 266, affirmed 151 F.2d 118, precedents have but little value in tax litigations, and the determination of the court should be based upon the intent of the statute and the particular facts.

That is exactly Petitioners' position in this case. What specific congressional revenue statute is involved in this litigation and what specific facts has Congress attached a legal consequence? In other words, what are the Major and Minor Premises in the legal syllogism?

II

Certiorari should be granted to address the fundamental, reasonable issues of substance ignored by the lower courts.

Fundamental fairness demands that reasonable issues be addressed by the courts. The Tax Court ignored the reasonable indebtedness and procedural issues raised by Petitioners and the Appeals Court sanctioned this departure.

An exercise of this Court's power of supervision is clearly called for.

III

Certiorari should be granted to preserve this nation as a nation of law.

It is axiomatic that this is a nation of law, not of men. The men of the administrative agency known as the Internal Revenue Service have made a determination that is not in accordance with any act of Congress, specified on any record. A denial of a granting of this writ would be tantamount to condoning political tyranny and governmental oppression, leaving Petitioners with no access to any court of law to adjudicate the reasonable issues of substance raised in the lower courts.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Date

PETITION FOR CERTIORARI

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FLORENCE V. COMMISSIONER
NO. 84-7693
JANUARY 22, 1986

MEMORANDUM*

Appeal from the United States Tax Court
Submitted August 12, 1985**

Before: BROWNING, Chief Judge, MERRILL and BRUNETTI, Circuit Judges.

Appellants Ronald and Marion Florence appeal pro se the tax court's grant of summary judgment to the Commissioner. Appellants failed to report on their 1977 tax return $19,007.69 in toke[1/] income earned as casino dealers. The Commissioner

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

**The panel finds this case appropriate for submission without argument pursuant to 9th Cir. R. 3(f) and Fed. R. App. P. 34(a).

issued a notice of deficiency stating that appellants owed $7,302.36 in additional taxes and $365.12 as a negligence penalty under 26 U.S.C. § 6653(a) (1982). Appellants petitioned the tax court for a redetermination of liability. The tax court granted summary judgment to the Commissioner and awarded him $500 in damages under 26 U.S.C. § 6673 (1976), which authorizes damages when proceedings are instituted merely for delay. We affirm and impose sanctions under Fed. R. App. P. 38 for a frivolous appeal.

Appellants do not challenge the factual basis of the deficiency determination. They instead challenge the government's power to tax individuals, the tax court's jurisdiction to adjudicate petitions for redetermination, the validity of the Internal Revenue Code because it has not been enacted into positive law, and the constitutionality of the tax

court's proceeding without a jury. These challenges are meritless. See, e.g., Ryan v. Bilby, 764 F.2d 1325, 1328 (9th Cir. 1985) ("Congress's failure to enact a title into positive law has only evidentiary significance and does not render the underlying enactment invalid or unenforceable... Like it or not, the Internal Revenue Code is the law ..."); Redhouse v. Commissioner, 728 F.2d 1249, 1253 (9th Cir. 1984) (tax court is constitutional and has jurisdiction to consider whether the tax statutes are valid); McCoy v. Commissioner, 696 F.2d 1234, 1237 (9th Cir. 1983) (denial of jury in tax court is constitutional); Edwards v. Commissioner, 680 F.2d 1268, 1270 (9th Cir. 1982) (per curiam) ("To the extent that appellants' ... briefs may be read to claim that the income tax, the Internal Revenue Code, or statutes establishing the Tax Court are unconstitutional, we

summarily reject such arguments. They have been raised and rejected many times.")

At the time this action began, 26 U.S.C. § 6673 authorized the tax court to award damages of up to $500 to the government if it appeared that the proceedings were instituted merely for delay.[2/] The tax court imposed the maximum penalty, holding that appellants' case was frivolous and groundless.[3/] We find no abuse of discretion. Appellants were on notice that their toke income was taxable; in their earlier petition for redetermination of their 1975 and 1976 tax liability the tax court so held. Florence v. Commissioner, ¶ 81,204 T.C.M. (P-H) 81-1041 (1981). Appellants should also have been aware that the courts, including this court, have repeatedly rejected their constitutional arguments.

This court has discretion to impose attorney's fees and single or double costs

as sanctions for bringing a frivolous appeal. Fed. R. App. P. 38. We have often exercised this discretion in appeals from the tax court, because "meritless 'tax protest' appeals have been found to be 'increasingly burdensome on the federal court system.'" Knigge v. Commissioner, 756 F.2d 1377, 1379 (9th Cir. 1985) (quoting Edwards v. Commissioner, 680 F.2d 1268, 1271 (9th Cir. 1982) (per curiam). See, e.g., Kalgaard v. Commissioner, No. 84-7659, slip op. at 5 (9th Cir. July 2, 1985); Larsen v. Commissioner, 765 F.2d 939, 942 (9th Cir. 1985); Nunley v. Commissioner, 758 F.2d 372, 373, (9th Cir. 1985); McCoy v. Commissioner, 696 F.2d 1234, 1235 (9th Cir. 1983) (per curiam).

An appeal is frivolous if "the result is obvious and the arguments of error are wholly without merit." Gattuso v. Pecorella, 733 F.2d 709, 710 (9th Cir. 1984) (per curiam). This appeal is

frivolous; appellants have raised meritless arguments that have been repeatedly rejected. We therefore impose on appellants reasonable attorney's fees and double costs payable to the government.

AFFIRMED.

FOOTNOTES

1. "Tokes" are the functional equivalents of tips for casino dealers and are taxable as income. Olk v. United States, 536 F.2d 876, 876 (9th Cir. 1976).

2. Section 6673 has since been amended to also allow damages when the taxpayer's argument is frivolous or groundless, and to increase the amount of the possible award to $5,000.

3. While the tax court did not explicitly find that the petitions were brought for purposes of delay, appellants have not made an issue of the omission, perhaps because the tax court's finding of frivolousness was tantamount to a finding of delay since delay is the most common purpose for which a frivolous tax petition is brought.

UNITED STATES TAX COURT

FLORENCE V. COMMISSIONER
NO. 14696-81
SEPTEMBER 6, 1984

ORDER AND DECISION

For the reasons set forth in the Memorandum Sur Order attached hereto and served herewith, it is

ORDERED that respondent's oral motion for summary judgment made July 19, 1984 is granted. It is further

ORDERED AND DECIDED that there is a deficiency in petitioner's Federal income tax for the taxable year 1977 in the amount of $7,302.36 and a deficiency in additions to tax pursuant to section 6653(a) for the taxable year 1977 in the amount of $365.12; and

That damages are due from petitioners which are hereby awarded to the United States in the amount of $500.00 pursuant to section 6673; Internal Revenue Code of 1954, as amended.

Hu S. Vandervort
Special Trial Judge

DOCKET NO. 14696-81

MEMORANDUM SUR ORDER

This case was called for trial on July 19, 1984 from the calendar of the Court's July 16, 1984 Las Vegas, Nevada special trial session. Counsel for respondent and petitioners, Ronald L. Florence and Marion Fayz Florence appeared.

Respondent on March 31, 1981 issued a notice of deficiency to petitioners in which he determined that petitioners had received additional income which was subject to Federal income tax. This additional income resulted from respondent's determination that petitioners failed to report toke income they had each received as casino dealers at the MGM Grand Hotel in Las Vegas, Nevada. Respondent also asserted an addition to tax for the negligent underpayment of taxes pursuant to section 6653(a).

The year involved in this case is 1977 and the deficiency asserted by the respondent in the statutory notice of deficiency is $7,302.36 with a penalty under section 6653(a) of $365.12.

In the petition filed to begin this case on June 23, 1981 petitioners do not address the adjustments made by respondent which resulted from his determination that they received additional income in the form of tokes in the course of their employment as dealers at the MGM Grand Hotel. Petitioners merely make broad assertions that they are not subject to Federal income taxes and that respondent has no jurisdiction over them.

When the case was called for trial, petitioner Ronald Florence, asserted that this Court did not have jurisdiction over him and that he was not a person that was

subject to Federal income tax.[1] In response to the Court's inquiry petitioner Ronald Florence said he had no dispute with the amount of toke income that respondent had determined with regard to both petitioners. Respondent then orally moved for summary judgment and in support thereof stated that no issue of material fact is now in dispute.

Rule 121 of this Court's Rules of Practice and Procedure[2] provides that a party may move for summary judgment on all or any part of the legal issues in controversy so long as there are no genuine issues of material fact. Rule 121(b)

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1 We note that in a prior case petitioner Ronald L. Florence contested respondent's determination with respect to the proper amount of toke income that should have been reported. Ronald L. Florence v. Commissioner, T.C. Memo 1981-305.

2 All references to a Rule are to the Tax Court Rules of Practice and Procedure, unless otherwise indicated.

states that a decision shall be rendered "* * * if the pleadings * * * and any other acceptable materials, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that a decision may be rendered as a matter of law." The burden of proving that there is no genuine issue of material fact is on the moving party. Graf v. Commissioner, 80 T.C. 944 (1983); Espinoza v. Commissioner, 78 T.C. 412 (1982). A motion for summary judgment will permit a judgment in respondent's favor based upon the presumption of correctness unless a nonmoving party introduces evidence in his pleadings to otherwise show that there is a genuine issue of material fact. Welch v. Helvering, 290 U.S. 111 (1933); Abramo v. Commissioner, 78 T.C. 154 (1982).

Petitioners have not introduced any evidence to show that there is a genuine

issue of material fact involved, since petitioners conceded that the amount of toke income as determined by respondent as not being disputed.

Petitioners have made a number of constitutional arguments, which are issues of law, which we will address.

Petitioners rely upon Flint v. Stone Tracy Co., 220 U.S. 107 (1911) and Lehnhausen v. Lake Shore Auto Parts, 410 U.S. 356 (1973) in asserting that the Federal income tax is an excise tax which can only be applied to corporations, not individuals. In Flint, supra, the Supreme Court upheld the 1909 tax on corporations' incomes, by holding it to be an excise tax - an indirect tax that did not have to be apportioned, even under the Pollock v. Farmers' Loan and Trust Co., 158 U.S. 601,

635 (1985)[3] view of the Constitution. The Sixteenth Amendment to the Constitution[4] overruled Pollock, permitting income taxes to be imposed qua income taxes (i.e., not as excise taxes) without apportionment, and thereby, eliminated the apparent constitutional hurdle that made it difficult for Congress to impose an income tax on individuals. Ratification was completed on February 13, 1913, and later the same year, there was enacted the predecessor of our present Internal Revenue Code, which has throughout U.S. history imposed income taxes on both individuals

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3 The Pollock opinions concluded that taxes on incomes from professions, trades, employments, or vocations were excise taxes not subject to the apportionment requirement.

4 The Sixteenth Amendment states that: The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

and corporations. See, New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

Lehnhausen v. Lake Shore Auto Parts,[5] supra, the second case petitioners rely upon concerns an Illinois provision which subjects corporations and similar entities, but not individuals, to ad valorem taxes on personal property. This Court has considerable difficulty understanding petitioner's reason for citing this case as it has no apparent application to Federal income tax statutes.

The constitutionality of the Congress' power (and its exercise of this power) to impose income taxes on individuals

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5 The United States Supreme Court reversed the Illinois Court and upheld the constitutionality, under the United States Constitution, of the Illinois constitutional amendment. On remand, the Illinois Supreme Court confirmed that "Bank Stock, like the shares of any other corporation, is exempt only when owned by a natural person or by two or more natural persons as joint tenants or tenants in common." Lake Shore Auto Parts v. Korzen, 296 N.E 2d 342, 343 (1973).

(including government and non-government employees) is well established. E.g., James v. United States, 366 U.S. 213 (1961).

Petitioners rely on Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), wherein the Supreme Court held unconstitutional the broad grant of jurisdiction to bankruptcy courts. Any application of the Northern Pipeline case to this Court was considered, and specifically rejected, in Rowlee v. Commissioner, 80 T.C. 1111 (1983), and we reject it herein.

Petitioners content next that since they are not government employees, nor a corporation, they are not subject to Federal income tax and thus, not required to file income tax returns. No authority, whatsoever, supports the petitioners' contentions and they are without merit. The constitutionality of the Federal income

tax laws passed since the enactment of the Sixteenth Amendment has been upheld judicially on too many occasions for us presently to rethink the underlying validity thereof. See, e.g., Brushaber v. Union Pacific Railroad Co., 240 U.S. 1 (1916); Stanton v. Baltic Mining Co., 240 U.S. 103 (1916); Cupp v. Commissioner, 65 T.C. 68 (1975), affd. 559 F.2d 1207 [unpublished Order dated 6-10-77] (3rd Cir. 1977).

The Sixteenth Amendment was enacted in response to the Supreme Court's decision in Pollock v. Farmers' Loan and Trust Co., supra, which held unconstitutional the income tax of 1894 as a direct tax without apportionment. The "whole purpose" of the Sixteenth Amendment, as stated by the Supreme Court in Brushaber v. Union Pacific Railroad Co., supra, at 18 was "to relieve all income taxes when imposed from apportionment from a consideration of

the source whence the income was derived." Thus, since the ratification of the Sixteenth Amendment, it is not relevant whether petitioners are government employees, a corporation or neither; they are still subject to Federal income taxes, and are required to file, under section 6011,[6] containing sufficient information from which Commissioner can compute and assess the liability with respect to a particular tax of a taxpayer. Automobile Club of Michigan v. Commissioner, 353 U.S. 180, 188 (1957).

There is no right to a jury trial in the Tax Court, and denial thereof, does not violate the Seventh Amendment. Londsdale v. C.I.R., 661 F.2d 71, 72 (5th Cir. 1981), affg. a Memorandum Opinion

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6 All statutory references are to the Internal Revenue Code of 1954 as in effect during the years in issue, unless otherwise indicated.

of this Court; Rowlee v. Commissioner, supra, at 1115.

Petitioners' Seventh Amendment right to a jury trial has not been violated here. Petitioners were afforded full opportunity to represent themselves at trial, pursuant to Rule 24(b). Petitioners assert that this Court is a "quasi court" and lacks jurisdiction in this case. The contention is without merit. Where, as here, a taxpayer receives a notice of income tax deficiencies (the notice was mailed to petitioners on March 31, 1981) and they filed a timely petition, with the United States Tax Court, the Tax Court's exclusive jurisdiction is invoked. Section 6512(a). The mere filing of the petition in the Tax Court is enough to deprive a United States District Court of jurisdiction for the years as to which the petition was filed. See, United States v. Wolf, 238 F.2d 447 (9th Cir. 1956). It is significant, that

it is the taxpayer's action in filing a valid petition in the Tax Court, under circumstances which give the Court jurisdiction, and not any action taken by the Court, that bars a subsequent suit. Elbert v. Johnson, 165 F.2d 421, 424 (2d Cir. 1947). It is now a settled principle that a taxpayer may not unilaterally oust the Tax Court from jurisdiction which, once invoked, remains unimpaired until it decides the controversy. See, Main-Hammon Land Trust v. Commissioner, 17 T.C. 942, 956 (1951); United States v. Shephard's Estate, 196 F. Supp. 281, 284 (N.D.N.Y., 1981).

Another issue to be decided, is whether petitioners are liable for additions to tax under sections 6653(a). An addition to tax under section 6653(a) is imposed if any part of any underpayment to tax is due to negligence or intentional disregard of rules or regulations. Since

the Commissioner determined that the petitioners were liable for such additions to tax, petitioners have the burden of proving error in respondent's determination and to show that they are not so liable. See, Bixby v. Commissioner, 58 T.C. 757, 791-792 (1972), BJR Corporation v. Commissioner, 67 T.C. 111, 131 (1976). Petitioners have not shown that they are not subject to the addition to tax under 6653(a).

The contentions made by petitioners that their income and wages are not subject to Federal income taxes is a stale one, long settled against them. As such, these contentions are frivolous and groundless. See, Rowlee v. Commissioner, supra; Grimes v. Commissioner, 82 T.C. 235 (1984).

Since we conclude that this case was frivolous and groundless, the maximum damages authorized by law, which is $500, are appropriate and will be awarded

pursuant to section 6673.[7]

We have fully considered the issues set forth by petitioners and are satisfied that they have no merit and in fact, indicate the frivolous nature of petitioners' position.

An appropriate order and decision will be entered.

Hu S. Vandervort
Special Trial Judge

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7 We note that in cases commenced after December 31, 1982, or pending in the United States Tax Court on the day which is 120 days after the date of enactment, (that is, July 18, 1984) of the Tax Reform Act of 1984, the Court may impose damages up to $5,000 for proceedings instituted or maintained by a taxpayer primarily, for delay or where a taxpayer's position in such proceedings is frivolous or groundless. See section 292(b), Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. 97-248, 96 Stat. 574, as amended by section 160 of the Tax Reform Act of 1984.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FLORENCE V. COMMISSIONER
NO. 84-7693
APRIL 16, 1986

ORDER

Before: BROWNING, Chief Judge, MERRILL and BRUNETTI, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35 (b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX B

TITLE 1, UNITED STATES CODE, SECTION 204

§ 204. Codes and Supplements as evidence of the laws of United States and District of Columbia; citation of Codes and Supplements

In all courts, tribunals, and public offices of the United States, at home or abroad, of the District of Columbia, and of each State, Territory, or insular possession of the United States--

(a) United States Code.--The matter set forth in the edition of the Code of Laws of the United States current at any time shall, together with the then current supplement, if any, establish prima facie the laws of the United States, general and permanent in their nature, in force on the day preceding the commencement of the session following the last session the

legislation of which is included: Provided, however, That whenever titles of such Code shall have been enacted into positive law the text thereof shall be legal evidence of the laws therein contained, in all the courts of the United States, the several States, and the Territories and insular possessions of the United States.

TITLE 26, UNITED STATES CODE, SECTION 6331 - LEVY AND DISTRAINT

(a) Authority of Secretary.--If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer,

employee, or elected official. If the Secretary makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

(b) Seizure and Sale of Property.--The term "levy" as used in this title includes the power of distraint and seizure by any means. Except as otherwise provided in subsection (e), a levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

AFFIDAVIT OF SERVICE

Under penalties of perjury, I, Ronald L. Florence, Petitioner in the foregoing petition for Writ of Certiorari, pursuant to Rules 28.4(a) and 28.5(c), Rules of the Supreme Court, do hereby affirm that the original and forty (40) copies of the petition have been mailed to the United States Supreme Court, One First Street NE, Washington, D.C. 20543, (Certified Mail No. P-496 467 629), with three (3) copies of the petition served via certified mail on each of the parties described below:

	Certified Mail No.
Glenn L. Archer, Jr. Assistant Attorney General U.S. Department of Justice Tax Division Washington, D.C. 20530	P-496 467 630
Solicitor General U.S. Department of Justice Washington, D.C. 20530	P-496 467 631

All parties required to be served have been served.

July 24, 1986. Ronald L. Florence
Ronald L. Florence

Sworn to me this 24th day of July, 1986.

Notary Public

Notary Public-State Of Nevada
County Of Clark
Michael Iglinski
My Appointment
Expires July 3, 1989